A **ROHGETANA MAYATHEVAN v. DR NAVIN KUMAR & ORS AND OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
VARGHESE GEORGE JCA
ZAMANI A RAHIM JCA
B ZALEHA YUSOF JCA
[CIVIL APPEALS NO: M-01(IM)-273-08-2015,
M-01(IM)-274-08-2015 & M-01(IM)-275-08-2015]
4 JANUARY 2017

C ***TORT:*** *Negligence – Medical negligence – Damages – Claim for – Child suffered from cerebral palsy from birth – Assessment of damages – Whether awards of certain items adequately considered – Whether claims supported by medical evidence – Factors considered – Life expectancy of a cerebral palsy female patient – Proper multiplier to be adopted – Whether upward or downward adjustment ought to be*
D *made on certain claims – Whether quantum awarded reasonable*

TORT: *Damages – Assessment of – Negligence – Medical negligence – Child suffered from cerebral palsy from birth – Whether awards of certain terms adequately considered – Whether claims supported by medical evidence – Factors considered – Life expectancy of a cerebral palsy female patient – Proper multiplier to be adopted*
E *– Whether upward or downward adjustment ought to be made on certain claims – Whether quantum awarded reasonable*

The third plaintiff together with her parents ('the first and second plaintiffs') sued for damages premised on a cause of action in medical negligence which
F allegedly occurred during her birth at the Malacca Hospital. It was claimed that in consequence thereof, the third plaintiff presently suffered from cerebral palsy. The first and second defendants were the medical officers attending to the case. The third defendant was sued on the grounds that they were vicariously liable as owners of the hospital for the alleged negligence. On 7 March 2013, the parties entered into a consent judgment whereby the
G defendants admitted to liability, with the issue of damages remitted to the Deputy Registrar of the court for assessment. On 23 October 2014, the Deputy Registrar delivered an award for damages in favour of the third plaintiff in the total sum of RM6,934,129,30. The plaintiff's total claim was for some RM9,291,904.20 while the defendants were only agreeable to
H concede to a sum of RM2,009,009.40. Both parties being dissatisfied with the award filed respective appeals against that decision. The judge dealt with both appeals together and on 30 June 2015, revised downwards the sum awarded to the first plaintiff to a total sum of RM4,859,322.76. The third plaintiff and the defendants respectively appealed herein. The issues that
I arose for consideration were (i) whether the complaint against the Deputy Registrar's award in respect of certain items were not or adequately considered by the judge; and (ii) whether the claims were supported by medical evidence, was speculative and in any event, whether the quantum awarded was unreasonable.

Held (order accordingly) A

Per Varghese George JCA delivering the judgment of the court:

(1) In respect of Therapies (Spastic Centre) and Complimentary Medicine (Ayurvedic), the defendants were of the view that only such expenses incurred as could be supported by receipts (documentary proof) ought to be allowed. However, the judge had not misdirected himself on the B law when he held that special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence. Such claims were to be allowed so long they were within a reasonable sum and justifiable in the circumstances. There was thus no reason to interfere with the award of the Deputy Registrar in respect of these two C items. (para 16)

(2) In respect of 'care by mother' and 'nutrition', the judge had agreed with the Deputy Registrar that the plaintiff's claim was justified in the circumstances but had disagreed with the monthly quantum allowed by D the Deputy Registrar, that was at the rate of RM500 per month in the case of both items of claim. The judge reduced the same to RM300 per month and RM250 per month respectively. As the plaintiff was a toddler/child with cerebral palsy, it called for more particular attention from the mother and further the child required added nutrition during those 35 months; there ought to be sufficient compensation granted for E the non-working mother's services and for the special dietary supplements required in the circumstances. Accordingly, the judge's revised quantum was upheld. (paras 17 & 18)

(3) As for medication, the judge upheld the sum of RM1,575 awarded by the Deputy Registrar stating that such a sum was within reasonable F extent considering that it was a small amount incurred over a period of 61 months and for emergency medication for minor ailments. Under the item travel and transportation, the Deputy Registrar had awarded a sum of RM82,191. However, there ought to be an adjustment downwards principally considering that the vehicle in question was likely to be used G by members of the family for other purposes during that period, and not solely for purposes of the plaintiff. Thus, while maintaining an award for 50% only in respect of the cost of the vehicle, a downward adjustment ought to be made in respect of the sum awarded for 'petrol' utilisation. Accordingly, the award was reduced under this item to a total of H RM60,841.60. (paras 21-25)

(4) As regards the award for care by mother, there was justification to reduce this rate further to RM200 a month for this period of 61 months, when as it would be appreciated, the plaintiff was between the age of three years to eight years; the previous period of the plaintiff's life up I to 35 months was a more critical phase and similar care by the mother was only, in any event, compensated at the rate of RM300 a month.

There was also evidence that the plaintiff's general condition had also shown some improvement over time. However, with regard to nutrition, the plaintiff required more and better nutrition as she was growing up and an award of RM350 per month for additional nutrition was fair in the circumstances; this compared well with the award of RM250 a month for nutrition granted to the plaintiff in respect of the earlier phase of her life up to 35 months. The plaintiff was a cerebral palsy child and that state of affairs required a different and involved nature of care and attention in the child's growing up years, unlike that would be the case with a normal child. (paras 26-28)

(5) The basic underlying thesis was that the developmental state of condition that a cerebral palsy patient was at a particular age would give a fair indication of the full life expectancy of that particular patient, that was, in contrast to the general life expectancy of an ordinary individual either female or male as the case may be, amongst the general population. In this case, using the Strauss Data/Table (2008), the plaintiff fell within the category of individuals classified as 'Rolls/sits, cannot walk' and 'fed by others' and the anticipated life expectancy of a female, according to the table at the age of 15 was a further 35 years of life. The judge had therefore, correctly deduced the likely years of survival for a female cerebral palsy patient like the plaintiff to be 50 years. The further agreed deductions on account of contingencies, vagaries of life and the advantage of a lump sum payment received in advance should be 30%. The proper multiplier that ought to be applied in this case was 30 years in the particular circumstances. (paras 35-38)

(6) Turning to the plaintiff's claims for holiday and respite care as well as for living expenses after attaining 18 years of age, the decision of the Federal Court in *Inas Faiqah Mohd Helmi (a child suing through her Father and Next Friend, Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* where similar heads of claim advanced for the plaintiff there was rejected on account of the fact that there was already an award for home modifications to accommodate the special needs of the plaintiff even after she attained 18 years of age and going on holidays was common in our society and the plaintiff's family would have in any event incurred such a cost regardless of the negligence of the defendants. These claims of the plaintiff were rightly rejected by the Deputy Registrar and the judge. Finally, as regards to the defendant's claim that there ought to be deductions from whatever sums awarded to the plaintiff *ie*, to account for tax/rebates or allowances that might be entitled to on the grounds of the plaintiff's condition or status as an orang kurang upaya ('OKU'), these contentions were highly speculative, general and lacking in specifics or details to be given any serious consideration. Whatever rebates or deductibles that might arise in the circumstances under the tax regime was for the benefit of and meant to alleviate the suffering of the parents, and not the plaintiff *per se*. (paras 48-50)

***Bahasa Malaysia** Headnote*

Plaintif ketiga, bersama-sama dengan ibu bapanya ('plaintif pertama dan kedua') menyaman untuk ganti rugi berdasarkan satu kausa tindakan dalam kecuaian perubatan yang didakwa berlaku semasa plaintif ketiga dilahirkan di Hospital Melaka. Akibatnya, plaintif ketiga kini mengalami palsi serebrum. Defendan pertama dan kedua adalah pegawai perubatan yang mengendalikan kes itu. Defendan ketiga disaman atas alasan bahawa mereka bertanggungjawab secara vikarius sebagai pemilik hospital untuk kecuaian yang didakwa. Pada 7 Mac 2013, pihak-pihak memasuki penghakiman persetujuan dalam guaman di mana defendan-defendan mengakui liabiliti, dengan isu ganti rugi diremitkan kepada Timbalan Pendaftar mahkamah untuk ditaksir. Pada 23 Oktober 2014, Timbalan Pendaftar menyerahkan award ganti rugi memihak kepada plaintif ketiga dalam jumlah keseluruhan RM6,934,129.30. Tuntutan keseluruhan plaintif adalah untuk jumlah RM9,291,904.20 sementara defendan-defendan hanya bersetuju untuk satu jumlah RM2,009,009.40. Kedua-dua pihak tidak berpuas hati dengan keputusan tersebut dan membuat rayuan masing-masing. Hakim mempertimbangkan kedua-dua rayuan itu dan pada 30 Jun 2015 menyemak jumlah yang diawardkan kepada plaintif pada jumlah keseluruhan RM4,859,322.76. Plaintif ketiga dan defendan-defendan masing-masing merayu. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada aduan terhadap award Timbalan Pendaftar berkenaan beberapa item dipertimbangkan dengan secukupnya oleh hakim; dan (ii) sama ada tuntutan-tuntutan yang dibuat disokong oleh keterangan perubatan, adalah spekulatif dan sama ada kuantum yang diawardkan tidak munasabah.

Diputuskan (perintah yang sewajarnya)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Berkenaan Terapi (Pusat Spastik) dan Ubat-Ubatan (Ayurvedic), defendan-defendan berpendapat bahawa hanya perbelanjaan yang ditanggung yang disokong oleh resit-resit (bukti dokumentar) wajar dibenarkan. Walau bagaimanapun, hakim tidak tersalah arah dari segi undang-undang apabila memutuskan bahawa ganti rugi khas, asalkan diplidkan dan dibutirkan, boleh dibuktikan oleh keterangan lisan atau dokumentar. Tuntutan-tuntutan sebegitu boleh dibenarkan asalkan ia dalam jumlah yang munasabah dan wajar dalam hal keadaan. Oleh itu, tiada alasan untuk mengganggu award yang diberikan oleh Timbalan Pendaftar berkenaan item-item ini.

(2) Berkenaan 'jagaan ibu' dan 'khasiat', hakim bersetuju dengan Timbalan Pendaftar bahawa tuntutan plaintif dijustifikasikan dalam keadaan tersebut tetapi tidak bersetuju dengan kuantum bulanan yang dibenarkan oleh Timbalan Pendaftar, iaitu pada kadar RM500 sebulan dalam kes kedua-dua item yang dituntut. Hakim mengurangkan jumlah kepada RM300 sebulan dan RM250 sebulan masing-masing. Oleh kerana

plaintif adalah seorang kanak-kanak kecil dengan palsi serebrum, dia memerlukan perhatian khususnya dari ibunya dan kanak-kanak ini memerlukan khasiat tambahan semasa 35 bulan; ganti rugi yang secukupnya harus diberikan untuk perkhidmatan seorang ibu yang tidak bekerja dan untuk keperluan diet khas dalam keadaan ini. Oleh itu, kuantum yang disemak oleh hakim dikekalkan.

(3) Untuk perubatan, hakim mengekalkan jumlah RM1,575 yang diawardkan oleh Timbalan Pendaftar dengan menyatakan bahawa jumlah itu adalah munasabah mempertimbangkan ia adalah jumlah kecil yang dibelanjakan dalam tempoh 61 bulan dan untuk perubatan kecemasan bagi penyakit ringan. Di bawah item pelancongan dan pengangkutan, Timbalan Pendaftar mengawardkan jumlah RM82,191. Walau bagaimanapun, harus terdapat pelarasan yang menurun mengambil kira bahawa kenderaan itu berkemungkinan akan digunakan oleh ahli keluarga yang lain untuk tujuan berlainan semasa tempoh itu, dan bukan hanya untuk kegunaan plaintif. Oleh itu, sementara mengekalkan hanya 50% berkenaan kos kenderaan, pelarasan yang menurun harus dibuat berkenaan jumlah yang diawardkan untuk penggunaan 'petrol'. Oleh itu, award dikurangkan di bawah item ini kepada jumlah RM60,841.60.

(4) Berkenaan award jagaan oleh ibu, terdapat justifikasi untuk mengurangkan kadar ke RM200 sebulan untuk tempoh 61 bulan, apabila plaintif berada dalam lingkungan umur tiga tahun hingga lapan tahun; tempoh sebelum itu iaitu 35 bulan pertama hidup plaintif adalah fasa yang lebih kritikal dan penjagaan sama oleh ibunya adalah dipampas sejumlah RM300 sebulan. Terdapat juga keterangan bahawa keadaan plaintif menunjukkan peningkatan. Walau bagaimanapun, berkenaan khasiat, plaintif memerlukan khasiat yang lebih semasa tumbesaran dan award RM350 sebulan untuk khasiat tambahan adalah adil; ini bagus apabila dibandingkan dengan award RM250 sebulan untuk khasiat yang diberikan kepada plaintif semasa awal fasa kehidupannya sehingga 35 bulan. Plaintif adalah kanak-kanak palsi serebrum dan melibatkan penjagaan dan perhatian yang berbeza semasa membesar, tidak seperti untuk kanak-kanak yang biasa.

(5) Tesis asas adalah bahawa terdapat perkembangan keadaan pesakit palsi serebrum pada umur tertentu akan memberi petunjuk yang jelas berkenaan jangka hayat penuh pesakit itu, iaitu, berbeza dengan jangka hayat umum seorang individu yang biasa sama ada perempuan atau lelaki, dalam kalangan penduduk umum. Dalam kes ini, menggunakan Strauss Data/Table (2008), plaintif terangkum dalam kategori individu-individu yang diklasifikasikan sebagai 'Berguling/duduk, tidak boleh berjalan' dan 'disuap makanan oleh orang lain' dan jangka hayat seorang perempuan, menurut jadual pada umur 15 adalah 35 tahun selanjutnya.

Hakim telah dengan betul meyimpulkan tahun-tahun kemungkinan kelangsungan hidup seorang pesakit perempuan yang mengalami palsi serebrum seperti plaintif pada umur 50 tahun. Potongan-potongan seterusnya yang dipersetujui berkenaan kontingensi-kontingensi dan perubahan hidup serta kelebihan bayaran besar sekaligus diterima dahulu adalah 30%. Dalam keadaan ini, pendarab yang seharusnya diguna pakai dalam kes ini adalah 30 tahun.

(6) Berkenaan tuntutan plaintif untuk percutian dan penjagaan rehat serta kos sara hidup selepas umur 18 tahun, keputusan Mahkamah Persekutuan dalam kes *Inas Faiqah Mohd Helmi (a child suing through her Father and Next Friend, Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* di mana tuntutan-tuntutan untuk plaintif telah ditolak atas fakta bahawa terdapat award untuk modifikasi tempat tinggal bagi keperluan khas plaintif selepas dia berumur 18 tahun dan untuk bercuti adalah biasa dalam masyarakat kita dan keluarga plaintif akan membelanjakan kos itu tanpa mengira kecuaian defendan-defendan. Tuntutan-tuntutan plaintif telah ditolak dengan betul oleh Timbalan Pendaftar dan hakim. Akhir sekali, berkenaan tuntutan defendan bahawa sepatutnya terdapat pengurangan daripada apa-apa jumlah yang diawardkan kepada plaintif iaitu menjelaskan rebat/cukai atau elaun yang mungkin berhak atas alasan keadaan atau status plaintif sebagai orang kurang upaya ('OKU'), hujahan-hujahan ini hanya spekulatif, umum dan tidak ada dalam butiran untuk diambil kira secara serius. Apa-apa rebat atau pemotongan yang mungkin timbul dalam keadaan ini di bawah rejim cukai adalah untuk kepentingan dan bertujuan untuk mengurangkan penderitaan ibu bapa, dan bukan untuk plaintif *per se*.

Case(s) referred to:

ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***
Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***
Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors & Another Appeal [2013] 8 CLJ 449 CA ***(refd)***
Inas Faiqah Mohd Helmi (a child suing through her Father and Next Friend, Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(foll)***
James Robshaw v. United Lincolnshire Hospitals NHS Trust [2015] Med LR 229 ***(refd)***

(Civil Appeal No: M-01(IM)-273 & 274-08-2015)
For the appellant - PS Ranjan, MS Dhillon & KB Karthi; M/s PS Ranjan & Co
For the respondent - Nik Mohd Noor Nik Kar & Muzila Mohamed Arsad; SFC

(Civil Appeals No: M-01(IM)-275-08-2015)
For the appellant - Nik Mohd Noor Nik Kar & Muzila Mohamed Arsad; SFC
For the respondent - PS Ranjan, MS Dhillon & KB Karthi; M/s PS Ranjan & Co

[Editor's note: Appeal from High Court, Melaka; Civil Suit No: 22-111-07-2011]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Varghese George JCA:

[1] The appellant in appeals M-01(IM)-273-08-2015 and M-01(IM)-274-08-2015 was the third plaintiff in an action filed on 3 September 2009, originally in the Sessions Court. The third plaintiff together with her parents (first and second plaintiffs) had sued for damages premised on a cause of action in medical negligence which allegedly had occurred during her birth on 19 November 2006 at the Malacca Hospital. It was claimed that in consequence thereof the third plaintiff presently suffers from cerebral palsy.

B

C

[2] The defendants who were cited in that action were the appellants now before us in M-01(M)-275-08-2015. The first and second defendants were the Medical Officers attending to the case. The third defendant was sued on the grounds that they were vicariously liable as owners of the Malacca Hospital for the alleged negligence.

D

[3] The action that had been filed in the Sessions Court was subsequently transferred to the High Court on 28 January 2011.

[4] On 7 March 2013 the parties entered a consent judgment in the suit whereby the defendants admitted to liability, with the issue of damages remitted to the learned Deputy Registrar of the court for assessment.

E

[5] At the hearing of the assessment of damages the parties adduced evidence through witnesses. On 23 October 2014 the learned Deputy Registrar delivered an award of damages in favour of the third plaintiff in the total sum of RM6,934,129.30. (The plaintiff's total claim was for some RM9,291,904.20, while the defendants were only agreeable to concede to a sum of RM2,009,009.40 thereto).

F

[6] Both parties being dissatisfied with the award of the learned Deputy Registrar filed respective appeals against that decision (lampiran 31 and lampiran 34B) to the judge in chambers.

G

[7] The learned judge dealt with both appeals together and in a decision delivered on 30 June 2015 revised downwards the sum awarded to the first plaintiff to a total sum of RM4,859,322.76.

[8] The third plaintiff and the defendants have respectively now appealed to us as per the appeal proceedings referred to in paras. 1 and 2 above against the learned judge's decision.

H

[9] For convenience the parties will be referred to herein as they appeared in the suit, namely as the plaintiff and the defendants.

'Summary Of Decision'

I

[10] We heard the appeals together on 1 April 2016 and after taking time to consider the respective submissions of counsel we delivered our decision on 6 May 2016. On that day we handed to counsel a 'summary of decision', a copy of which is attached to this grounds as annexure A.

[11] There were four categories under which damages had been awarded. They were: A

(a) Special damages – loss or expenses incurred before the filing of the suit (35 months);

(b) Pre-trial damages – loss or expenses incurred between the filing of the suit (30 September 2009) and the date of assessment by the learned Deputy Registrar (23 October 2014) that is, for 61 months; B

(c) Future damages; and

(d) Pain and suffering/general damages. C

[12] We will in this grounds of decision make reference to annexure A to place in proper perspective the categories and the subheads of claim under each of those categories (where applicable) to facilitate in capturing:

(a) what were the respective awards made by the learned Deputy Registrar and whether such amount allowed had been subsequently varied by the learned judge; D

(b) whether an appeal had been taken before us either by the plaintiff or the defendants or by both against the sum ordered by the learned judge; and

(c) our adjustment, if any, made to those appealed items after having considered the submissions of respective counsel. E

[13] In that respects, the abbreviations used in the table in the annexure A referred to the following:

(a) @COA Appeal by: whether the appeal before us was by the plaintiff (P) or by the defendants (D) or by both (P, D) or there was no appeal (NA) in respect of each item. F

(b) TP : the learned Deputy Registrar (Timbalan Pendaftar)

(c) JC : the learned Judicial Commissioner (judge in chambers)

(d) P : plaintiff's position G

(e) D : defendants' position

(f) COA : our computation in respect of each head of claim.

Submissions And Our Deliberations H

Special Damages

[14] The defendants' complaint was that their appeals against the Deputy Registrar's award in respect of the following items (as in annexure A) were not or adequately considered by the learned judge: I

(2) Therapies (Spastic Centre)

(3) Complimentary medicine (Ayurvedic)

A (6) Care by mother

(9) Nutrition

[15] The learned judge's treatments of the defendants' respective contentions are found in paras. 57 to 73 of the grounds of judgment. It was B common ground that the award of damages under this category would be over a period of 35 months.

[16] In respect of Therapies (Spastic Centre) and Complimentary medicine (Ayurvedic), the defendants persisted before us that only such expenses incurred as could be supported by receipts (documentary proof) ought to be C allowed. We however did not find that the learned judge had misdirected himself on the law when he held that special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence (*ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1). Such claims were to be allowed so long they were within a D reasonable sum and justifiable in the circumstances. Like the learned judge, we therefore did not find any reason to interfere with the award of the learned Deputy Registrar in respect of these two items.

[17] In respect of 'care by mother' and 'nutrition' the learned judge had agreed with the learned Deputy Registrar that the plaintiff's claim was E justified in the circumstances but had disagreed with the monthly quantum allowed by the learned Deputy Registrar, that is at the rate of RM500 per month in the case of both items of claim. The learned judge reduced the same to RM300 per month and RM250 per month respectively.

[18] The learned judge had reasoned that as the plaintiff was a toddler/ F child with cerebral palsy, it called for more particular attention from the mother and further the child required added nutrition during those 35 months; there ought to be sufficient compensation granted for the non-working mother's services and for the special dietary supplements required in the circumstances but not in the sums awarded by the learned Deputy G Registrar. We did not find any fault in that reasoning and accordingly the learned judge's revised quantum were upheld by us.

Pre-Trial Damages

[19] The defendants' grievance before us was restricted to the sums allowed H under the following items by the learned Deputy Registrar and the learned judge:

(12) Medication

(14) Therapies (Ayurvedic)

I (17) Travel/Transportation

(18) Care by mother

(20) Nutrition

[20] The plaintiff, on the other hand, was dissatisfied with their claim for 'holidays and respite care' being not entertained by the learned Deputy Registrar and the learned judge.

[21] With respect to 'medication', it was the defendants' contention that no sum should be allowed for medicines purchased at private clinics or pharmacy as they were available at government clinics without any charge. The learned judge nevertheless upheld the sum of RM1,575 awarded by the Deputy Registrar stating that such an sum was within reasonable extent considering that it was a small amount incurred over a period of 61 months, and as contended, for emergency medication for minor ailments like influenza and such like.

[22] As regards the therapies (Ayurvedic), the defendants' contention, similarly as under special damages, was that only the receipted amount of RM5,837 ought to be allowed. As earlier allowed under special damages, the learned judge upheld the learned Deputy Registrar's decision that this was a reasonable expense that could be proved even by oral evidence.

[23] We were not convinced therefore that the learned judge had erred in his conclusion in respect of the claims under the heads of 'medication' and therapies (Ayurvedic)' and accordingly refused to interfere with the same.

[24] Under the item travel/transportation the learned Deputy Registrar had awarded, a sum of RM82,191 made up of as follows:

(a) RM39,491.60 representing 50% of the cost of purchasing a Toyota Avanza, and

(b) RM42,700 being cost of petrol calculated at RM700 per month for the 61 months period.

This was upheld by the learned judge.

[25] It was the defendants' contention before us that there ought to be an adjustment downwards principally considering that the vehicle in question was likely to be used by members of the family for other purposes during that period, and not solely for purposes of the plaintiff. We found merit in this contention and accordingly was of the view that while maintaining an award for 50% only in respect of the cost of the vehicle, a downward adjustment ought to be made in respect of the sum awarded for 'petrol' utilisation. Accordingly we reduced the award under this item to a total of RM60,841.60 broken down as follows:

RM39,491.60 (50% of cost of vehicle)

RM21,350 (RM350 per month for petrol x 61 months)

[26] As regards the award for 'care by mother', the learned Deputy Registrar had allowed the same at the rate of RM500 per month while the learned judge had reduced the rate to RM400 per month. We were of the view that there was justification to reduce this rate further to RM200 per month for this period of 61 months when, as it would be appreciated, the plaintiff was between the age of three years to eight years; the previous period of the plaintiff's life up to 35 months was a more critical phase and similar care by the mother was only, in any event, compensated at the rate of RM300 per month. There was also evidence that the plaintiff's general condition had also shown some improvement over time.

[27] However with regard to 'nutrition' we were in agreement with the learned judge that the plaintiff required more and better nutrition as she was growing up and an award of RM350 per month for additional nutrition was fair in the circumstances; this compared well with the award of RM250 per month for nutrition granted to the plaintiff in respect of the earlier phase of her life up to 35 months. We found no reason therefore to disturb the learned judge's award under this head of claim.

[28] The defendants' contention, as earlier alluded to, was that 'mothers care' and 'nutrition' constituted normal incidents in a child's life which had in any event to be borne by all parents. We however rejected that argument since the plaintiff in this case was a 'cerebral palsy-child' and that state of affairs required a different and involved nature of care and attention in the child's growing up years, unlike that would be the case with a normal child.

[29] The plaintiff's complaint that its claim for 'holidays and respite care' during this period had been wrongfully disallowed by both the learned Deputy Registrar and the learned judge, is dealt with by us below under the future damages category, where a similar head of claim was also advanced by the plaintiff but had also been rejected by both the learned Deputy Registrar and the learned judge.

Future Damages

[30] The respective items that were the subject of the appeals by the defendants and the plaintiff before us are as denoted by 'D' and 'P' in annexure A under the listing of claims for future damages. The defendants' contention were basically that the heads of claim were not supported by the medical evidence, was speculative and in any event, the quantum awarded was unreasonable. It was also the argument of the defendants that certain of the future treatment or medical attendances as outlined by the plaintiff were available in the Government Hospital and related official facilities. Accordingly it was contended that such claims for 'future damages' ought not be allowed at all and even if allowed, not for the sums ordered by the learned Deputy Registrar and/or the learned judge.

[31] On the part of the plaintiff the thrust of counsel's submission was primarily three-fold, namely: A

(a) The derived multiplier with respect of the life-expectancy of the plaintiff which was revised and applied by the learned judge (28 years) was erroneous and low; the assessment of the learned Deputy Registrar thereto of 40 years should be reinstated; and B

(b) The supposedly applied one-third (1/3)-only rule, whereby costs or expenses of certain items of claims put up by a plaintiff was not allowed in full if it was shown such treatment or amenities were available or accessible at Government Hospitals or facilities, was no longer good law in the light of the recent Federal Court decision in *Inas Faiqah Mohd Helmi (a child suing through her Father and Next Friend, Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885. C

(c) The paramount consideration in considering claims for future medical expenses as also elucidated in *Inas Faiqah (supra)* was 'reasonableness' of those expenses and further that the standard of proof required of a claimant was a 'lower degree of certainty'. D

[32] We first address the issue related to how the multiplier was derived from the anticipated 'life-expectancy' of the plaintiff in the condition she was presently in. We must firstly highlight the fact that the learned judge had E extensively analysed the testimonies of both party's respective witnesses (SP6, SD2, SD1) (See paras. 13 to 24, in particular paras. 19 and 20). The learned judge preferred the evidence of the SD1 especially with regard to the likely life expectancy of a person in the particular state or condition as was the plaintiff in at the commencement of trial. This was to be specifically with F reference to her developmental milestone at that point, namely when the damages were to be assessed for future losses.

[33] SP6's original assessment was that the plaintiff had to be fed by care-giver but under cross-examination SP6 agreed that the plaintiff had shown much improvement since her first assessment. SD2's evidence was G that the plaintiff, "... Boleh makan dengan sendiri menggunakan tangan kanan dengan sedikit bantuan daripada ibunya". SD1's evidence was that at the age of seven years (when the consent judgment was entered) the plaintiff 'could only hold a milk bottle with her right hand but could not feed herself or transfer objects between hands ... could not grasp objects with her left H hand'. It was not in serious dispute that the plaintiff could not still sit-up on her own or walk.

[34] Although some other reference work was recommended by the witness for the plaintiff, all the aforesaid expert witnesses were nevertheless agreed that the Strauss Data/Table that was available was an acceptable premise for I the court to draw some assistance to work out the anticipated life expectancy

of the plaintiff; this was because there were no comparable Malaysian studies or statistics available on the subject. The learned judge placed reliance on the Strauss Data/Table since the English court in *James Robshaw v. United Lincolnshire Hospitals NHS Trust* [2015] Med. LR 229, involving a similarly circumstanced cerebral palsy child, had also referred and analysed the findings set out in that Strauss Data/Table where the authors of the same had noted:

> Survival prognosis for persons with CP should take into account age and severity of disability.

[35] The basic underlying thesis was that the developmental state or condition that a cerebral palsy patient was at a particular age would give a fair indication of the full life-expectancy of that particular patient, that is, in contrast to the general life expectancy of an ordinary individual, either female or male as the case maybe, amongst the general population. In this case, using the Strauss Data/Table (2008) the plaintiff fell within the category of individuals classified as 'rolls/sits, cannot walk' and 'fed by others' (FBO) and the anticipated life-expectancy of a female, according to the Table at the age of 15 (which was the closest age group available), was a further 35 years of life. (An extract of the Strauss Data/Table reproduced at p. 350 of the *Robshaw (supra)* case report is attached hereto as annexure B)

[36] The learned judge had therefore, in our assessment, correctly deduced the likely years of survival for a female cerebral palsy patient like the plaintiff to be 50 years, that is, 35 years (as in the Table) plus the 15 years (the age at which the analysis was pegged to) as per the 2008 Strauss Data/Table. This was the starting point from which the multiplier was to be worked out subject to adjustments for the relevant age and other contingencies.

[37] However, as submitted by counsel for the plaintiff there was in any case two errors even if the anticipated life expectancy of 50 years as determined by the learned judge was upheld. They were:

(a) The reduction made on account of the age of the plaintiff should be as at the time of commencement of trial/admission of liability. The plaintiff was aged seven years then and the deduction should be only seven, and not eight which was her age after the assessment of damages were completed; and

(b) The further agreed deductions on account of contingencies, vagaries of life and the advantage of a lump sum payment received in advance should be 30%. This was accepted by the learned judge but in the arithmetical calculation the deduction in effect amounted to 33.3% of the balance after the life expectancy of 50 years had been reduced by 'eight years' (wrongfully, as adverted to above). In other words, even if

42 years was to be the base figure, a 30% reduction thereto would have resulted in: 42 minus 12.6 = 29.4 years and not the 28 years as ruled by the learned judge to be the applicable multiplier.

[38] We found merit in both the submissions aforesaid of the plaintiff and accordingly was of the view that the proper calculations to derive the multiplier to be applied should be as set out below:

Life Expectancy ...	35 + 15 = 50
Less Age at commencement of Trial/admission of liability ...	- 7
	43
Less Contingencies and Lump sum in advance	- 30%
	(12.9)
	30.1
Multiplier to be adopted:	30 years.

The proper multiplier that ought to be applied in this case, in our unanimous view was 30 years in the particular circumstances and with due regard of the plaintiff's condition in this case.

[39] There was an incidental issue raised by the defendants that the 30% deduction referred to as 'agreed' was never the subject of any agreement by the defendants. Our attention was drawn to the grounds of the learned Deputy Registrar which expressly stated that the parties had agreed that the deductions to be effected on account of contingencies etc would be 30%. No issue seem to have been specifically taken in respect of that at all by the defendants before the learned judge who then proceeded to further affirm that the quantum of deduction of 30% was agreed to by the parties, save that the learned judge, as elaborated above had made an arithmetical error in the calculation thereof applying a 33.3% deduction.

[40] The plaintiff's next overarching contention was that it was no longer the law that only a sum of 1/3 of the sum claimed would be allowed for heads of claims in respect of which medical attention, medication and treatments was available at Government Hospital or similar public facilities that was accessible to a person, such as in this case, the plaintiff. This, it was further argued, was irrespective of whether it was for past or future damages. The counsel for the plaintiff cited the recent Federal Court decision in *Inas Faiqah (supra)* in support of this submission

[41] The Federal Court in *Inas Faiqah (supra)* in referring to the so called application of the 'one-third practice', argued by some to have been propounded by the Court of Appeal in *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321 and in *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors & Another Appeal* [2013] 8 CLJ 449, had this to say:

> [36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision of *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. **In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration.** The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also shows that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres. (emphasis added)

(On the evidence in *Inas Faiqah's (supra)* case however, the Federal Court was of the view that it was fair and reasonable for the trial court to have only awarded one-third of the amount claimed there.)

[42] It is pertinent at this point to also reproduce the further observations of the Federal Court in *Inas Faiqah (supra)* which, undoubtedly has now put at rest certain doubts or controversy in respect of what were the salient matters to be borne in mind when the court was called upon to assess the damages to be awarded, particularly in the context of medical negligence cases.

[43] With regard to what would be fair damages, the apex court said:

> [20] *It is trite that damages serve as compensation, not a reward, less still a punishment* (see *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324). *In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the recognised balance of probabilities standard.* As was stated in *Schrump* ([1977] 82 DLR (3d) 553):
>
> > Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative.

> The qualification as underscored in that sentence is in our considered view, necessary to be proven on a balance of probabilities.
>
> ...
>
> ...
>
> [24] With the above proposition, we are of the view that *the standard of proof with regard to the assessment of future loss of damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word "possibility", "chance", "risk", "danger" or "likelihood", but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative, and that the standard of proving such "possibility", "chance", "risk", "danger" or "likelihood" of the future damage is still, in our opinion, on a balance of probabilities.*
>
> (emphasis added)

[44] Further, in *Inas Faiqah (supra)* the Federal Court noted that the appellant there was of the view that the claimant's evidence was not required to be weighed according to standards of scientific proof, strict proof, specific proof or even the balance of probabilities (para. 9 of the judgment). To that the Federal Court said:

> [17] Having perused the authorities advanced by learned counsel for the appellant, we are of the view that the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. We say so because *while it is true that a plaintiff needs only to show that there is a reasonable chance of a loss or damage occurring in order for him to succeed in his or her claim for future loss or damage, the standard of proof* required in proving such a claim remains the same that is on *the balance of probabilities.* In our understanding, the principles set in *Schrump and Hawkins* ([1966] 3 All ER 228) merely outline the degree of certainty to be attached in relation to the assessment of the chance of likelihood that a loss or damage might reasonably happen in the future loss and damage. In our view, such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which cans be satisfied by the production of the related and sufficient evidence from the expert or by some other cogent evidence.
>
> (emphasis added)

[45] Reverting then to the specific appeals by the respective parties in respect of the claims under the category of future claims as set out in annexure A, we were of the view that our intervention was only justified where, firstly, if the criteria as to proof of the respective heads of claim as now elucidated in *Inas Faiqah (supra)* by the Federal Court were not met,

secondly, if there had to be a recalculation effected by reason of the multiplier being adjusted from 28 years to 30 years as discussed and ruled above, and finally, if the '1/3 rule' applied by the learned judge was unreasonable in the particular context of any head of claim.

[46] As regards the issues related to the sufficiency of proof (on a balance of probabilities) and reasonableness of the items and sums claimed thereunder, we must highlight the fact that assessment of damages had gone through two levels of process, namely by the learned Deputy Registrar and before the learned judge on appeal. We did not find their conclusions to be plainly wrong to disallow any of the awards for those items listed under that category.

[47] It will be noted that save for the following the recalculations of the damages awarded by us was to reflect the multiplier applied at 30 years and the exclusion of the '1/3 rule' as applied by the learned Deputy Registrar and/or the learned judge.

(a) 37. Travel: The reasonable quantum for petrol per month, in our view, was RM500 (in place of RM700 allowed) but for 30 years noting in particular that the petrol expenses allowed under the pre-trial period had been now adjusted downwards to RM350 per month;

(b) 40. Specialist Consultations: We maintained that there be allowed nine consultations each year for 30 years but this was an item where the 1/3 of the RM180 per visit sought as damages would constitute a reasonable sum as similar consultation could be availed of by the plaintiff at Government facilities.

[48] Turning then to the plaintiff's further claims for (i) holiday & respite care and (ii) for living expenses after attaining 18 years of age, we only need to refer to the decision of the Federal Court in *Inas Faiqah (supra)* where similar heads of claim advanced for the plaintiff there was rejected on account of the fact that there was already an award for home modifications to accommodate the special needs of the plaintiff even after she attained 18 years of age and going on holidays was common in our society and the plaintiff's family would have in any event incurred such a cost regardless of the negligence of the defendants (see paras. 56 to 59 of the judgment of the Federal Court). Similar circumstances obtained here in this instant appeal before us, and we were of the view that these claims of the plaintiff were rightfully rejected by the learned Deputy Registrar and the learned judge.

[49] Finally, as regards the defendants' claim that there ought to be deductions from whatever sums awarded to the plaintiff (i) to account for Tax/Rebates or allowances that might be entitled to on the grounds of the plaintiff's condition or status as an 'Orang Kurang Upaya' (OKU) and (ii) to account for the costs of a normal cost of living which would have in ordinary course been incurred by the plaintiff or her parents, we found these

contentions highly speculative, general and lacking in specifics or details to be given any serious consideration. In any event, whatever rebates or deductibles that might arise in the circumstances under the tax regime was for the benefit of and meant to alleviate the suffering of the parents, and not the plaintiff *per se*.

[50] In the circumstances and for the reasons elaborated above the final award of damages we allowed to the plaintiff were as set out in the amounts and for the respective items/heads of claim as per the last column in annexure A to this grounds.

Attachments

1. Annexure A
2. Annexure B

Annexure A

M-01-273-08/2015 (P's appeal)

M-01-274-08/2015 (P's appeal)

M-01-275-08/2015 (D's appeal)

Summary Of Decision

A. Life Expectancy of Plaintiff – Multiplier to be applied

P still need some assistance; she is not able to fully self-feed herself.

With reference to the Strauss Data/ Table (2014) relied by both parties, our calculation is as follows:

Life Expectancy	35 + 15 = 50	
Less Age at date of commencement of Trial/admission of liability	- 7	
		43
Less Contingencies and lump sum payment in advance – agreed by parties to be 30%	- 30%	
		30.1
Multiplier to be adopted in this case		30 years

A

B. Special Damages

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
1.	Hospitals and clinics	NA	2826.70	2826.70			2826.70
2.	Therapies (Spastic Centre)	D	6000.00 RM20 x 12 x 25 mths	6000.00		1618.20	6000.00
3.	Complimentary medicine (Ayurvedic)	D	1050.00	1050.00		Nil	1050.00
4.	Medical reports	NA	40.00	40.00			40.00
5.	Travel	NA	20690.00	20690.00			20690.00
6.	Care by mother	D	17500.00	10500.00 RM300 pm x 35 mths		(7000.00)	10500.00
7.	Care by aunt	NA	Nil				-
8.	Care by grandmother	NA	Nil				-
9.	Nutrition	D	17500.00	8750.00 RM250 pm x 35 mths		Nil	8750.00
10.	Hygiene	NA	Nil				-
11.	Travel by grandmother	NA	Nil				-
							49856.70

B C D E F G H I

C. Pre-Trial Damages (Filing of Writ (30.09.2009) to TP Assessment (23.10.2014) – 61 months)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
12.	Hospitals, Clinics, Medication (2000 + 1575)	D	3575.00	1575.00		1575.00	1575.00
13.	Pain and suffering from surgery, botox and serial casting	NA	Nil	Nil			
14.	Therapies (Ayurvedic)	D	23100.00 RM50 x 22 mth x 21 session pm	23100.00		5837.00 per receipt (April 2013 to Feb. 2014)	23100.00
15.	Home visit physiotherapy	NA	650.00	650.00			650.00
16.	Complimentary medicine (Spastic School)	NA	3050.00	2600.00			2600.00
17.	Travel (Toyota M/Van – Petrol – (1/3)	D	82191.60	82191.60		39540.70	60841.60 RM39,491.60 (50% cost of vehicle) + RM21,350.00 (Petrol – RM350 pm x 61 mths)
18.	Care by mother	D	30500.00	24400.00 RM400 x 61 mths		(12200.00) RM200 x 61 mths)	24400.00
19.	Care by grandmother	NA	Nil	Nil			-
20.	Nutrition	D	34500.00 RM500 x 61 mth	21350.00 RM350 x 61 mths		Nil	21350.00
21.	Hygiene	NA	18700.00	10445.40			10445.40
22.	Holidays and respite care	P	Nil	Nil			-
23.	Appliances and equipment	NA	3236.00	3236.00			3236.00 148197.60

D. Future Damages

No	Item	@ COA Appeal by:	T P	JC	P	D	COA
28.	Surgery (for joint contracture) (available in Govt Hospital)	D	19000.00	19000.00		(6500.00)	19000.00
29.	Pain and suffering from surgery	D	30000.00	30000.00		Nil	30000.00
30.	Home modifications	NA	150000.00	150000.00			150000.00
31.	Therapies (physio, occupational, speech – available at Govt facilities)	D P (multiplier)	835200.00 (RM1740 x 12 x 40 yrs)	584640.00 (RM1740 x 12 x 28 yrs)		162960.00 (Physio – 135 x 12 x 28 yrs (45360.00) (Occupational – RM135 x 12 x 28 yrs (45360.00) (Speech – RM215 x 12 x 28 yrs (72240.00)	626400.00 (RM1740 x 12 x 30 yrs)
32.	Complimentary treatment	D P (multiplier)	1496800.00	976740.00		553380.00	1125600.00
	(i) Ayurvedic		110800.00 (RM110 x 21 sessions x 12 x 40)	726160.00 (RM110 x 21 sessions x 12 x 28)			831,600.00 (RM110 x 21 sessions x 12 x 30 yrs)
	(ii) Hydrotherapy		192000.00 (RM400 x 12 x 40)	134400.00 (RM400 x 12 x 28)			144,000.00 (RM400 x 12 x 30 yrs)
	(iii) HBOT (Agreed)		12000.00	12000.00			12000.00
	(iv) Stem Cell		160,000.00 (RM4000 x 40) x 28)	37380.33 (RM4000 x 1/3			120000.00 (RM4000 x 30)
	(v) Acupuncture		24000.00 (RM600 x 40)	16800.00 (RM600 x 28)			18000.00 (RM600 x 30)
33.	Maids	D P (multiplier)	1108000.00 (RM27700 x 40)	775600.00 (RM27700 x 40)		292992.00	831000.00 (RM27700 x 30)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
34.	Care by parents	D P (multiplier)	240000.00 (RM500 x 12 x 40)	134400.00 (RM400 x 12 x 28)		(67200.00)	180000.00 (RM500 x 12 x 30)
35.	Hygiene	D P (multiplier)	144000.00 (RM300 x 12 x 40)	100800.00 (RM300 x 12 x 28)		57590.40	108000.00 (RM300 x 12 x 30)
36.	Nutrition	D P (multiplier)	240000.00 (RM500 x 12 x 40)	134400.00 (RM400 x 12 x 28)		(56112.00)	144000.00 (RM400 x 12 x 30)
37.	Travel	D P (multiplier)	826000.00 (RM490000 - Van + RM336000 - Petrol)	585200.00 (RM350000 - Van + RM235200 - Petrol) (700pm x 12 x 28)		381200.00	530000.00 (RM350000 - Van + RM180000. - Petrol) (500 x 12 x 30)
38.	Assistive devices (+ computer)	P (Multiplier; No 1/3)	483700.00 (100000.00 computer)	341400.00 231500.00 (Devices) (Additional) 4800.00 12500.00 17600.00 25000.00 (Computer) 50000.00		291400.00	341400.00
39.	Hospital and clinic visits	P (“)	53320.00 (RM4000 x 1/3 x 40)	37324.00 (RM4000 x 1/3 x 28)			120000.00 (RM4000 x 30)
40.	Specialist consultations	P (“)	21600.00 (180 x 1/3 x 9 Specialists x 40)	15120.00 (RM180 x 1/3 x 9 x 28)			16200.00 (RM180 x 1/3 x 9 x 30)
41.	Medication	P (“)	16800.00 (35 x 12 x 40) (35 =1/3 x 100)	11760.00 (35 x 12 x 28)			12600.00 (35 x 12 x 30)
42.	Botox	P (“)	144000.00 (RM1800 x 2 x 40)	20533.00 (RM2200 x 1/3 x 28)			66000.00 (RM2200 x 30)
43.	Special education	P (“)	480000.00 (RM3000 x 1/3 x 12 x 40)	336000.00 (RM3000 x 1/3 x 12 x 40)			720000.00 (RM2000 x 12 x 30)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
44.	Holidays and respite care	P	Nil	Nil			-
45.	Living expenses after attaining age of 18 years	P	Nil	Nil			-
							5020200.00

E. General Damages

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
46.	General damages for pain suffering and loss of amenities	NA	385000.00	385000.00			385000.00

F. Deductions (Benefits)
(Defendant's appeal)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
47.	Normal costs v OKU	D	Nil	Nil			Nil
48.	Income tax rebate	D	Nil	Nil			Nil

G. Interest

TP's award: (i) 4% on Special Damages from 19.11.2006 (incident) to (07.03.2012). 07.03.2013 (judgment on liability)

(ii) 8% on Pre Trial Damages + Damages for Pain and Suffering/Loss of Amenities from (13.11.2008)(13.10.2009) to date of judgment on liability (07.03.2012)

(iii) 5% on Judgment sum from 07.03.2013 to date of payment.

JC: - affirmed above.

COA: (a) At 5 % pa from date of filing of Suit (30.09.2009) until full settlement on

(i) Special Damages (49856.70)

(ii) Pre Trial Damages (148197.60)

(iii) Pain and Suffering (385000.00)

(b) On all other damages awarded at 5% pa from date of judgment on liability (07.03.2013) until full settlement.

H. Costs - To be submitted by Counsel.

ANNEXURE - B

49. Table 1 of the 2008 paper was as follows:

Table 1: Life expectancy (additional years) by age and cohort

Sex/Age (y)	Cannot lift head			Lifts head or chest			Rolls/sits, cannot walk			Walks unaided	General population
	TF	FBO	SF	TF	FBO	SF	TF	FBO	SF		
Female											
15y	13	16	-	16	21	-	21	35	49	55	65.8
30y	14	20	-	15	26	-	16	34	39	43	51.2
45y	12	14	-	13	16	-	14	22	27	31	37.0
60y	-	-	-	-	-	-	-	-	16	20	23.8
Male											
15y	13	16	-	16	20	-	19	32	45	51	60.6
30y	14	19	-	15	24	-	16	31	35	39	46.5
45y	12	14	-	13	15	-	14	20	23	27	32.8
60y	-	-	-	-	-	-	-	-	13	16	20.4

TF, tube fed; FBO, fed by others, without feeding tube; SF, self-feeds.

50. It was that latter table that both Dr Ferrie and Dr Rosenbloom took as the framework for the assessments of life expectancy up until and including the discussion in July 2014.

51. In his report dated November 2013 Dr Ferrie had given the following as his reason for adhering to the view that James would probably survive to around 70 years of age:

"In my previous Report I estimated that James will probably survive to around 70 years of age. This estimate was based upon the likelihood that at 15 years of age he would continue to be able to roll and scoot and to be substantially self-feeding. Since I gave this estimate a gastrostomy feeding tube has been inserted. However, I do not think it would be appropriate to consider James within the Strauss cohort of those fed by gastrostomy since it is clear that the majority of his calories continue to be given orally. On the basis of the information available to me when I re-evaluated James, I no longer felt it likely that at 15 years of age he would be able to self-feed to any significant extent and that he should be considered within the cohort of subjects who roll/sit but cannot walk and are fed by others. This would equate with a significant reduction in my previous estimate of his life expectancy. However, more recent evidence indicates that James is now obtaining a significant proportion of his calories orally and that he has rapidly learnt to use the Nester Eater. His self-feeding skills are likely to further improve and on this basis I feel that his life expectancy should be calculated (as before) on the basis that he best fits in the Strauss cohort of those who can who roll/sit and self-feed (recognising that he will not fully self-feed). Taking this and additional positive and negative factors into consideration I estimated that he would probably survive until around 70 years of age. I remain of the opinion that this is an appropriate estimation of his life expectancy."

52. The reasons that thereafter led him to reduce this estimate to 66 years was set out in the memorandum referred to above as follows:

"Dr Ferrie now considers that James is likely to survive until 65.75 years (66 years if rounded to the nearest year). This is less than the estimates in his reports due to him now considering it appropriate to now make a bigger reduction than he originally did to reflect James's limited self-feeding skills, the presence of the gastrostomy and his acceptance that his cognitive and intellectual level and his general health are neutral rather than positive factors."

53. Dr Ferrie arrived at the foregoing figure by the route revealed in the following two paragraphs in the memorandum:

"The approach of Dr Ferrie is that the relevant cohort for James is rolls/sits, cannot walk and self feeds. A 15-year-old male with these abilities has a life expectancy according to Strauss of 45 additional years (survival to 60 years) compared to 60.6 additional years (survival to 75.6 years)